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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955

VAUGHN C. PAYNE, SR., Individually,
EDITH PRUITT PAYNE and
VAUGHN C. PAYNE, SR., as next friend of
VAUGHN C. PAYNE, JR.,
Petitioners

v.

GUS F. KOEHLER, District Director of Internal Revenue,
Respondent

No. 484

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955

VAUGHN C. PAYNE, SR., Individually, EDITH PRUITT PAYNE and VAUGHN C. PAYNE, SR., as next friend of VAUGHN C. PAYNE, JR., Appellants v. GUS F. KOEHLER, District Director of Internal Revenue Appellee	No. 15,351

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Vaughn C. Payne, Sr., Individually, Edith Pruitt Payne and Vaughn C. Payne, Sr., as next friend of Vaughn C. Payne, Jr., respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit in cause styled "Vaughn C. Payne, Sr., Individually, Edith Pruitt Payne and Vaughn C. Payne, Sr., as next friend

of Vaughn C. Payne, Jr., Appellants v. Gus F. Koehler, District Director of Internal Revenue, Appellee", affirming the motion to dismiss the appeal on August 10, 1955, on the grounds that the appeal was not taken on a final order of the District Court for Eastern District of Missouri.

JUDGMENT AND APPLICATION FOR CERTIORARI

The judgment of the United States Court of Appeals was entered on August 10, 1955 and this petition is filed within 90 days thereafter [Record 1 and 2 of the U. S. A. appeals opinion.]

STATEMENT OF THE CASE

This case arises under the Internal Revenue Code and involves liability for income of Vaughn C. Payne, Sr., individually. Plaintiffs on the 4th day of November, 1954, at the hour of 10:00 a. m. filed a notice of their intention to file a preliminary injunction to restrain the director of Internal Revenue and any defendants therein and all persons who or may be under control of them at said time, all persons to whom knowledge of this shall come and each and every one of them from collecting the salary of Vaughn C. Payne for the reason that said salary is exempted to the extent of 90% under the law of the State of Missouri. That said injunction shall be made upon the grounds that the continuation of collection of said 90% of said salary violated the law of the State of Missouri and will inflict and has inflicted irreparable injury to plaintiff, Vaughn C. Payne, due to the fact that it deprives his wife and child of their rightful share of his income for a living. Further stating that there was no adequate remedy at law [Record Page 1 and 2].

After the service of appeal notice and filing of said injunction, which was denied, by the District Court on the 17th day of March, 1955, [Record 32 & 49] and on said date plaintiffs filed motion to set aside said order together with petition for an amended injunction lodged with said motion joining the treasurer and the comptroller of the City of St. Louis. [Record 35-49]. On April 1, 1955 [Record 49] a motion for rehearing was filed, which was denied, together with the Motion To Set Aside order of March 17, 1955 on April 13, 1955. [Record 47 & 49].

On April 18, 1955 [Record 49] an appeal was taken to the 8th Circuit Court of Appeals from said orders and on August 10, 1955, a motion to dismiss was sustained. [Record U. S. C. A. Appeals #2].

Upon these facts, as more fully disclosed in the Record, four questions were presented to the Tax Court of the United States:

1. Whether or not the tax collector could take more than 10% of the salary from the head of a family in contravention to the State Statute.

2. Whether or not the collector could lawfully or legally collect the salary of a city employee under a writ of distraint in contravention of the State Statute, which requires

   A. a judgment
   B. after the judgment and writ of sequestration which distraint order violates the State Statute.

3. Where an amended petition if filed after the original is filed containing new matter [joining other defendants] after its denial will an appeal lie from said denial as of a final judgment.

4. If an appeal is inadvertently taken from a motion to set aside the judgment and a motion for rehearing, will a Motion Nunc Pro Tunc be allowed to supply the inadvertence.

The United States Court of Appeals dismissed the judgment on the grounds that the appeal was not taken from the final judgment and denied the plaintiffs motion Nunc Pro Tunc [Record 47-49]. [Record of U. S. Court of Appeals #2].

JURISDICTION TO REVIEW

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code [Act of June 25, 1948, Chapter 646, 62 Stat. 928. 28 U.S. C.A. 1254].

STATUTES INVOLVED

The following Missouri State statutes are involved:

Sec. 513.440 "Each head of a family, at his election, in lieu of the property mentioned in the first and second subdivision of section 513.435 may select and hold, exempt from execution any other property, real, personal or mixed, or debts and wages, not exceeding in value the amount of three hundred dollars, except ten per cent or any debt, income, salary or wages due such head of a family [Missouri Revised Statutes 1949][1327]

Sec. 525.310 Compensation of state is subject to sequestration after a judgment has been rendered against him. [Missouri Revised Statutes 1949]

Sec. 10 of the Constitution of the State of Missouri and the 5th Amendment of the Constitution of the United States.

Both sections hold that no property can be taken without due process of law.

DECISION OF LOWER COURT

The appellants did not appeal from the final order of March 17, 1955 but attempted to appeal from

the order of April 13, 1955 which merely denied the appellants motion for rehearing and to set aside a final order dismissing a cause of action.

The record before us does not suggest that our ruling will occasion injustice. It is expressly provided by statute that, with certain exceptions not here in point, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C.A. 1952 Ed., Sec. 3653, 26 U.S.C.A., 1954 Ed., Sec. 7421. The courts have consistently held against the judicial injunction of administrative collection of taxes. See HERNANDEZ V. MC GHEE, 294 Fed. 460; MC MULLEN V. SHEEHAN, 95 F. 2d 129, certiorari denied 305 U.S. 607; MILLIKEN V. GILL, 211 F. 2d 369; GRAHAM V. DU PONT, 262 U.S. 234, 43 S.Ct. 567. 67 L. Ed. 965; STATE RAILROAD TAX CASES, 92 U.S. 973, 23 L. Ed. 633. R. 4 - U.C.A. 8th District.

We also feel that there are no "extraordinary and entirely exceptional circumstances" which would take this case out of the provisions of the statute. HILL V. WALLACE, 259 U.S. 44, 43 S. Ct. 453, 456, 66 L. Ed. 882.

For the reasons stated, the motion to dismiss the appeal of the appellants is sustained.

QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether or not the tax collector could take more than 10% of the salary from the head of a family in contravention to the State Statute.

2. Whether or not the collector could lawfully or

legally collect the salary of a city employee under a Writ of Distraint in contravention of the State Statute, which requires

A. a judgment
B. after the judgment and Writ of Sequestration which distraint order violates the State Statute.

3. Where an amended petition if filed after the original is filed containing new matter [joining other defendants] after its denial will an appeal lie from said denial as a final judgment.

4. If an appeal is inadvertently taken from a motion to set aside the judgment and a motion for rehearing, will a motion Nunc Pro Tunc be allowed to supply the inadvertence.

REASON FOR ALLOWANCE OF THE WRIT

[A]. All four questions involved in this case are very important and in order to conserve the respect and dignity of the Constitution of the United States the Supreme Court should decide once and for all whether or not the taking of more than 10% of the salary of the "Head of the Family", violates the State and National constitutions, by taking the property of the plaintiffs without due process of law when the statute of the sovereign state of Missouri protects the plaintiff to the extent of 90% of his earnings for the support of his family.

This question has never been decided. Sec. 10 Constitution of the State of Missouri - 5th Amendment to the Constitution to the United States. R. S. Mo. 1949 - Sec. 525.310.

[B]. The second point should be determined by this court for the reason that it has been held that a Warrant of Distraint is not a proceeding in Court, neither is it a judgment. The statute of the State of Missouri requires the plaintiff to obtain a judgment and after the judgment has been obtained, then the plaintiff proceeds by a Writ of Sequestration. Supra.

[C]. Where an amended petition containing new matter is filed together with a motion to set aside the denial of the original petition, will an appeal from the decision of the amended petition be considered and held as a final judgment?

[D]. If an appeal is inadvertedly taken from a Motion to Set Aside a Judgment and a Motion for Rehearing, will a Motion Nunc Pro Tunc be allowed to supply the inadvertance?

In re Wight Petitioner, 10 Supreme Court 487
Matheson Administrators v. Grant Administrators, 2 Howard - 263
Fultz v. Laird, 24 Fed. 2nd L C. 173

There is no law which determines the ownership of funds set aside by the state from the salary of the "Head of the Family" under state statute. The Petitioners desire the court to rule on the ownership of the said salary which is exempted by state statute, as to whether or not said salary could be considered an "Estate by the Entirety" and thus exempted from levy for taxes.

Petitioners are aware of the fact that in a motion before the Court no reference can be made to any matter not directly pertaining to the motion, however, since the respondent referred in its brief on

page 25-Sec. 6 - Record to the attempt on the part of the petitioners to file an injunction to prevent the collection of the salary of the petitioner, Vaughn C. Payne, your petitioners feel that since the "door has been opened" by the respondent, they will also exercise the right to refer to it as follows:

Will an injunction lie to prevent the Director of Internal Revenue, Gus F. Koehler, from collecting the salary of the Head of the Family by a distraint proceeding when the State Statute requires that a judgment must first be obtained and then a Writ of Sequestration should be applied for, in order to legally collect the salary or any part of it for taxes.

Sec. 525.310, R. S. Mo., 1949

A suit against State Officers to enjoin them from inforcing the tax alleged to be in VIOLATION of the CONSTITUTION of the United States is not a suit against a state within the prohibition of the 11th Amendment.

Gunter v. Atlantic Coastline R. Co., 200 U. S. 273-88 - 1906.

Justice Harlan states as follows:

"It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a State from inforcing unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment." Record p. 44.

Prout v. Star, 188 U. S. 537
Reagan vs. Farmers Loan & Tea Co., 154 U. S. 362 [Cases cited in brief].

A. Can the wife or son of the Head of the Family sue in her or his own right as a participant and beneficiary under the sum allotted to them by the statute of the State which protects a certain sum allotted to a husband for the maintenance of his family, as a non-taxpayer.

B. Can the Head of the Family, who is protected by the law of the State to the extent of 90% of his earnings, maintain an injunction to prevent the collection of the excess over and above 10% which collection violates the state law.

WHEREFORE, Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Eighth Circuit commanding that Court to certify and send to this Court for its review and determination, on the day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket, #15,351, VAUGHN C. PAYNE, SR., EDITH PRUITT PAYNE and VAUGHN C. PAYNE, as next friend of VAUGHN C. PAYNE, JR., Petitioner vs. GUS H. KOEHLER, District Director of Internal Revenue, Respondent, and that said judgment of the said Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

VAUGHN C. PAYNE, ET AL
By ELLIS S. OUTLAW,
Their Attorney

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,351.

Vaughn C. Payne, Sr., Individually, Edith Pruitt Payne and Vaughn C. Payne, Sr., as Next Friend of Vaughn C. Payne, Jr.,

Appellants,

vs.

Gus F. Koehler, Director of Internal Revenue,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 10, 1955.]

H. Brian Holland, Assistant Attorney General, Ellis N. Slack and Kurt W. Melchior, Special Assistants to the Attorney General, Harry Richards, United States Attorney, and W. Francis Murrell, Assistant United States Attorney, for Appellee, filed Brief in Support of Motion to Dismiss Appeal.

Ellis S. Outlaw, for Appellants, filed Answer to Motion to Dismiss Appeal.

On Motion Appellee to Dismiss Appeal.

Before GARDNER, Chief Judge, and WOODROUGH and JOHNSEN, Circuit Judges.

WOODROUGH, Circuit Judge.

This action was brought in Federal Court by Vaughn C. Payne, Sr., Individually, Edith Pruitt Payne and Vaughn C. Payne, Sr., as next friend of Vaughn C. Payne, Jr. against Gus F. Koehler, Director of Internal Revenue. The action sought to obtain a preliminary injunction restraining the defendant Director from the collection of taxes by levies upon the salaries due to the plaintiff taxpayer, Vaughn C. Payne, Sr., which salaries were paid by the City of St. Louis, Missouri. The complaint further prayed that defendant be ordered "to refund to the plaintiffs any and all sums collected from the City of St. Louis, Missouri from August 20, 1950 to the present date with interest at 6% * * *." The complaint was filed on November 13, 1954. The plaintiff moved for a preliminary injunction and the Director moved to dismiss the complaint. The plaintiff's motion was denied and the defendant's motion to dismiss was sustained by the District Court in an order dated March 17, 1955 and reading as follows:

"The Court having before it the Plaintiff's motion for a preliminary injunction, and the motion of the Defendant Gus F. Koehler, Director of Internal Revenue, to dismiss, and having examined said motions, studied the briefs, heard the argument of counsel, and being fully advised in the premises, It is Hereby Ordered that said motion for preliminary injunction should be and is hereby dismissed; and It Is Further Ordered that said motion to dismiss should be and is hereby dismissed at plaintiff's costs."

Within ten days thereafter, on March 22, 1955, plaintiff moved for a rehearing of the cause and to set aside the

and is hereby sustained, and cause is hereby dismissed at plaintiff's cost."

order of dismissal. This motion was overruled by the court in an order dated April 13, 1955. Within the time provided by Rule 73(a) of the Federal Rules of Civil Procedure, the plaintiff took an appeal to this Court "from the order described to wit.". The plaintiff then quoted the order dated April 13, 1955 which order overruled the plaintiff's motion for a rehearing of the cause and to set aside the order of dismissal dated March 17, 1955.

We have before us now the Appellee's Motion to Dismiss the appeal on the grounds that this Court does not have jurisdiction because the appeal was improperly taken insofar as it was not taken from a final order or judgment of the District Court but was taken from the denial by the District Court of a motion for rehearing and to set aside a final order dismissing a cause of action. Appellants have filed an answer to the Motion to Dismiss and also a supplemental amended Answer.

We think that appellee's motion to dismiss the appeal is well taken. 28 U.S.C. 1952 Ed., Sec. 1291 states that "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." In *United States* v. *Muschany*, 156 F.2d 196, this court set down the applicable rule as follows:

"The general rule is that if a motion for rehearing or for a new trial, or to vacate, amend or modify a judgment or the findings upon which it is based, is made seasonably and is entertained, such motion has the effect of extending the time for appeal from the judgment [sought to be affected] until final disposition of the motion. Such a motion is held to deprive the judgment 'of that finality which is essential

to appealability.' *Leishman* v. *Associated Electric Co.*, 318 U.S. 203, 205, 63 S. Ct. 543, 87 L. Ed. 714. This does not mean, however, that an order disposing of such a motion is an appealable order or that an appeal from it brings up for review the question of the legality of the judgment."

"A timely motion which challenges the correctness of a judgment or order is intended to afford the trial court an opportunity to reconsider its action in entering the judgment and to amend it. The motion merely postpones the finality of the judgment and extends the time for appeal from the judgment. An appeal from the denial of such a motion is not an appeal, or the equivalent of an appeal, from the judgment or order the modification of which is sought. *In re Schulte-United, Inc.*, 8 Cir. 59 F.2d 553, 559; *State of Missouri* v. *Todd*, 8 Cir., 122 F.2d 804, 806; *Jones* v. *Thompson*, 8 Cir., 128 F.2d 188, 189; *Brown* v. *Thompson*, 8 Cir., 150 F.2d 171, 172, 173. The appeal lies from the final judgment or order challenged by the motion, and not from the District Court's refusal to modify it. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149, 150, 63 S.Ct. 133, 87 L. Ed. 146; *Bowman* v. *Loperena*, 311 U.S. 262, 266, 61 S. Ct. 201, 85 L. Ed. 177; *Wayne United Gas Co.* v. *Owen Illinois Glass Co.*, 300 U.S. 131, 137, 57 S. Ct. 362, 81 L. Ed. 557; *Conboy* v. *First National Bank of Jersey City*, 203 U.S. 141, 145, 27 S. Ct. 50, 51 L. Ed. 128; *Alexander* v. *Special School District of Booneville*, 8 Cir., 132 F. 2d 355, 358; *Brown* v. *Thompson, supra*, 150 F. 2d 171, pages 172, 173."

The appellants did not appeal from the final order of March 17, 1955 but attempted to appeal from the order of April 13, 1955 which merely denied the appellants motion for rehearing and to set aside a final order dismissing a cause of action.

The record before us does not suggest that our ruling will occasion injustice. It is expressly provided by statute that, with certain exceptions not here in point, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C.A.,

1952 Ed., Sec. 3653, 26 U.S.C.A., 1954 Ed., Sec. 7421. The courts have consistently held against the judicial injunction of administrative collection of taxes. See *Hernandez* v. *McGhee*, 294 Fed. 460; *McMullen* v. *Sheehan*, 95 F. 2d 129, certiorari denied 305 U.S. 607; *Milliken* v. *Gill*, 211 F.2d 369; *Graham* v. *DuPont*, 262 U.S. 234, 43 S. Ct. 567, 67 L. Ed. 965; *State Railroad Tax Cases*, 92 U.S. 975, 23 L. Ed. 633.

We also feel that there are no "extraordinary and entirely exceptional circumstances" which would take this case out of the provisions of the statute. *Hill* v. *Wallace*, 259 U.S. 44, 43 S. Ct. 453, 456, 66 L. Ed. 822.

For the reasons stated, the motion to dismiss the appeal of the appellants is sustained.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

This is to certify that three copies of this opinion together with three copies of the writ of certiorari has been mailed to the Solicitor General of the United States, this 26th day of September, 1955.

Ellis S. Outlaw,
Attorney for Plaintiffs

Subscribed and sworn to before me this 26th day of September, 1955.

Hazel Selvey, Notary Public

My term expires: April 27, 1957.